No. 79-685

In the Supreme Court of the United States

OCTOBER TERM, 1979

DRESSER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 596 F. 2d 1231.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1979. A petition for rehearing was denied on July 30, 1979. The petition for a writ of certiorari was filed on October 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to challenge investigations of the Securities and Exchange Commission and a grand jury sitting in the District of Columbia

by filing a collateral suit in the Southern District of Texas prior to the issuance of investigative subpoenas by either the Commission or the grand jury.

2. Whether petitioner had standing to bring suit on behalf of its employees under the Privacy Act.

STATEMENT

1. The present litigation results from petitioner's attempts to enjoin ongoing independent investigations by the Securities and Exchange Commission and the Department of Justice into certain questionable or improper foreign payments. The investigations followed petitioner's participation in the SEC's "voluntary disclosure program" (Pet. 4-5; Pet. App. A6). The voluntary disclosure program was instituted by the SEC in 1974 as a result of revelations of bribery of foreign political officials and of other questionable payments by United States corporations. Encouraging corporations to comply with the disclosure requirements of the federal securities laws, the SEC suggested that concerned corporations could best meet their obligations by taking the following steps:[1]

(1) authorizing an independent investigation, the results of which would be reported to a special committee of the board of directors whose members were not involved in any questionable activities and who were not officers of the corporation;

[1]The voluntary disclosure program is fully described in the *Report on Questionable and Illegal Corporate Payments and Practices*, submitted by the SEC to the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 4-11 (Comm. Print, May 1976). It is also described in detail in the opinion of the court of appeals in *SEC* v. *Dresser Industries, Inc.*, No. 78-1702 (D.C. Cir. Nov. 19, 1979), slip. op. 3-5.

(2) adopting an appropriate corporate policy with respect to such payments or practices; and

(3) disclosing material facts developed during the investigation in reports filed publicly with the SEC.

The SEC's program contemplated complete disclosure of material facts with respect to any questionable payments made during the five preceding years.

The SEC cautioned corporations with respect to possible consequences of participating in the voluntary disclosure program. The SEC stated that "participation in the voluntary program does not insulate a company from Commission enforcement action * * *." Moreover, participants were warned that "the Commission refers matters that appear to represent violations of domestic law to the appropriate law enforcement authorities." The SEC also stated to participants that as "[a]n essential element" of the program, participants "must agree to grant the Division of Enforcement access to the report and its underlying documentation." Participants were advised that "[m]aterials submitted to the Commission may be subject to release under the Freedom of Information Act or pursuant to Congressional request." *Report on Questionable and Illegal Corporate Payments and Practices*, *supra*, at 8-9.

2. In January 1976, petitioner entered the SEC's voluntary disclosure program. At a meeting with the SEC's staff, petitioner stated that it was conducting an internal inquiry into questionable payments (Pet. App. A6). Petitioner gave the SEC written assurances that it would provide access to all documents collected during its investigation (R. 101, 105).[2] Subsequently, petitioner

[2] "R." refers to the record in the court of appeals.

reported, in general terms, a number of questionable or illegal foreign payments on forms filed with the SEC (R. 3).[3]

The SEC's staff requested access to petitioner's report of investigation and underlying documents in accordance with the terms of the program and petitioner's written undertaking (R. 4; Pet. App. A7). Failing to comply with its earlier agreement, however, petitioner denied the SEC access to the underlying documents, contending that it was concerned about potential public release of the documents pursuant to the Freedom of Information Act (R. 19-24).[4]

3. In the fall of 1976, the Department of Justice established a task force to investigate possible criminal violations by United States corporations arising from questionable foreign payments. In August 1977, the SEC granted the Department's request to make available to task force attorneys and investigators its files, which included information concerning several hundred corporations, including petitioner. Because the materials furnished by petitioner to the SEC did not identify the

[3]Contrary to the requirements of the voluntary disclosure program, the information described in those filings related only to a three-year period (R. 101).

[4]SEC staff members assured petitioner's counsel that its concern about public release of information would be ameliorated, to the extent permitted by law, by providing notice to petitioner in advance of any public release of the information under the Freedom of Information Act (R. 103, 133-134).

countries or participants in the firm's foreign payments, the task force attempted to secure voluntary production of this information. No agreement was reached.[5]

4. Petitioner subsequently filed suit in the United States District Court for the Southern District of Texas to restrain the investigation of the SEC and Department of Justice (R. 1). It took this action before the SEC had determined to pursue a formal investigation and before the grand jury had issued a subpoena. The complaint sought to enjoin demands for additional information by the Department of Justice and the SEC, or, in the alternative, to obtain continuous supervision by the district court over each investigation. In addition, petitioner sought an order that the SEC and the Department of Justice acknowledge the availability of an exemption from disclosure under the Freedom of Information Act and an assurance that they would not release corporate information (R. 13).

The district court dismissed petitioner's complaint. The United States Court of Appeals for the Fifth Circuit affirmed (Pet. App. A), holding that petitioner's claim that the SEC had exceeded its authority was not ripe for review and that its allegation that the SEC breached its agreement to maintain complete confidentiality of its documents did not state a claim upon which relief could be granted.

5. In April 1978, a subponena duces tecum, returnable before a grand jury in the District of Columbia, was served upon John V. James, petitioner's Chairman,

[5]The Department of Justice offered to accept information from petitioner on the understanding that it would be maintained in confidence, stored in locked facilities, and returned to petitioner in the event that the investigation ended without the initiation of criminal proceedings. Petitioner's attorneys were also informed that it was the policy of the Department of Justice not to release

President and Chief Executive Officer (DOJ Br. App. 17).[6] Petitioner subsequently sought to quash the grand jury subpoena in the District Court for the District of Columbia. The district court ordered petitioner to comply with the subpoena, after entering an order pursuant to Fed. R. Crim. P. 6(e) to preserve the confidentiality of the documents in question (DOJ Br. App. 34, 37). Petitioner thereafter produced the documents sought by the grand jury.

6. In the meantime the SEC issued a formal order initiating an investigation. This action was undertaken in light of petitioner's continued refusal to honor its agreement to grant the SEC access to the documents relating to petitioner's investigation of improper corporate payments (SEC Br. App. 7-9).[7] An administrative subpoena was subsequently issued (*id.* at 14-16). When petitioner failed to respond to the subpoena, the SEC applied to the United States District Court for the District of Columbia for an order compelling compliance (*id.* at 1-6). After holding a hearing on the SEC's application, and after considering all of petitioner's challenges to the subpoena and the SEC's investigation, the district court ordered petitioner to comply with the subpoena in all respects. *SEC* v. *Dresser Industries, Inc.*, 453 F. Supp. 573 (D.D.C. 1978). The United States Court of Appeals for the District of Columbia Circuit subsequently affirmed. *SEC* v. *Dresser Industries, Inc.*, No. 78-1702 (D.C. Cir. Nov. 19, 1979), slip op. 28 (petitions for rehearing pending).

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materials developed during an ongoing criminal investigation or to disclose commercial trade secrets or information obtained from a confidential source.

[6] "DOJ Br. App." refers to the appendix to the brief for the Department of Justice in the court of appeals.

[7] "SEC Br. App." refers to the appendix to the SEC's brief in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the District Court for the Southern District of Texas should have entered an order enjoining the investigations of the SEC and the grand jury sitting in the District of Columbia or should have sequestered and monitored the use of documents obtained in the course of both investigations. The basis for this assertion is that certain members of the SEC's staff purportedly caused petitioner to believe that the documents that it tendered to the agency would be held in complete confidence, would not be used in additional investigations, and would not be subject to public disclosure under the Freedom of Information Act.

However, even assuming that there were merit to petitioner's claim that an agreement between itself and the SEC had been breached (which there is not, as discussed below), it was not permissible for petitioner to challenge the ongoing investigations of the grand jury and the SEC by filing a collateral proceeding in the District Court for the Southern District of Texas. Petitioner had a fully adequate remedy in the subpoena enforcement forum—the District Court for the District of Columbia. Petitioner was free to (and did) raise all of its challenges to the investigations in that forum at the time the government sought enforcement of the subpoenas. In light of the fully adequate procedures for judicial review available in the District Court for the District of Columbia, petitioner's collateral attack was properly dismissed. See *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964) (judicial review limited to the subpoena enforcement forum "works no injustice and suffers no constitutional invalidity"); *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 174-175 (1927); *Casey* v. *FTC*, 578 F. 2d 793, 798-799 (9th Cir. 1978). See also *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967).

Although petitioner argues (Pet. 18-24) that its rights would be "obliterated" absent collateral review in the Southern District of Texas, it has failed to show any error in the conclusions of the court below (Pet. App. A11-A12) that there was no "final" government action justifying immediate judicial review, that petitioner would suffer no irreparable injury from being required to pursue its remedies in the subpoena enforcement forum, and that the present litigation would "most certainly" impede effective enforcement of the law. See *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 149-154. These considerations were sufficient to justify the decision of the lower courts remitting petitioner to its remedies in the District Court for the District of Columbia.

Moreover, although the court below did not decide whether the SEC had in fact breached any agreement with petitioner, that question was addressed in the subpoena enforcement forum. When it enforced the SEC's subpoena, the District Court for the District of Columbia found (453 F. Supp. at 575):

> Throughout the voluntary disclosure program the SEC reserved its rights to pursue a formal investigation and issue subpoenas if necessary. It is readily apparent that the SEC never agreed to completely forego its rights to subpoena additional material. Furthermore, there is no indication that the SEC has proceeded in bad faith.

The D.C. Circuit also held, in affirming the district court's order, that no breach of agreement with petitioner ever occurred. *SEC* v. *Dresser Industries, Inc.*, *supra*, slip op. 23.

Finally, as the court below correctly noted, even if petitioner believed that the employees of the SEC with whom it dealt intended to offer an agreement that would

foreclose further investigation by the SEC and the Department of Justice, petitioner and its experienced counsel had no legal basis for relying on such an offer. Employees of the SEC are not empowered to waive the agency's statutory authority to investigate violations of the law, much less to tie the hands of the Department of Justice in investigating federal crimes.[8] Equally, they have no power to alter the terms of the Freedom of Information Act. As the court of appeals correctly noted (Pet. App. A12-A13):

> [T]he federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority * * *. 'Whatever the form in which the Government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority.' * * * If the rule were otherwise, a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of the most heinous crimes * * *.

The cases cited by petitioner do not support an opposite result and do not conflict with the decision of the court of appeals in the present case. *United States* v. *Minnesota Mining & Manufacturing Co.*, 551 F. 2d 1106 (8th Cir. 1977), and *Santobello* v. *New York*, 404 U.S. 257 (1971), do not address the question of ripeness or appropriate forum. Both cases were criminal

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[8]See, *e.g.*, *United States* v. *Fields*, 592 F. 2d 638, 646-648 (2d Cir. 1978), cert. denied, No. 78-1474 (June 4, 1979) (assurances by SEC staff members do not bar criminal prosecutions by the Department of Justice).

prosecutions in which the defendant invoked a prior plea agreement with the government in the court in which the prosecution was pending. In neither case was there a more appropriate forum—such as the subpoena enforcement forum here involved—in which the defendant's claims should have been raised. Moreover, in each case the prosecutor possessed authority to negotiate binding plea agreements with the criminal defendants (see, *e.g.*, 404 U.S. at 261). Similarly, in *Geisser* v. *United States*, 513 F. 2d 862 (5th Cir. 1975), the district court adjudicated a claim of breach of a plea agreement in a habeas corpus proceeding. The forum in which the habeas corpus petition was filed was the same forum in which the defendant had pleaded guilty after her plea agreement. The same district judge who had approved the plea agreement was asked to determine whether it had been breached. See *In Petition of Geisser*, 554 F. 2d 698, 699 (5th Cir. 1977). No question of by-passing the appropriate forum was presented. Moreover, the plea agreement that the petitioner sought to enforce in *Geisser*—a promise by the prosecutor to use his "best efforts" to persuade the Department of State and the Swiss government to forego extradition—did not involve a relinquishment of the government's statutory authority to investigate violations of federal law (see 554 F. 2d at 706).[9]

2. Petitioner finally contends (Pet. 24-27) that the court of appeals erred in denying it standing to litigate claims that its employees might have under the Privacy

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[9]*Leedom* v. *Kyne*, 358 U.S. 184 (1958), is likewise irrelevant here. That case involved final agency action that was amenable to judicial review on an immediate basis. The Court noted that the plaintiffs had "no other means" to "protect and enforce" their rights. *Id.* at 190-191. In the present case, a grand jury and administrative investigation were in their incipient stages; petitioner was free to (and did) challenge demands for documents and information in the subpoena enforcement forum.

Act of 1974, 5 U.S.C. 552a. But the Act vests the district court with jurisdiction over actions commenced by an "individual." See 5 U.S.C. 552a(g)(1). The petitioner corporation is not an "individual" as defined in the Privacy Act (5 U.S.C. 552a(2)) and thus is unable to assert claims under the Act, either for itself or others. The court of appeals noted (Pet. App. A15) that the Act's legislative history leaves "no room for debate" on this subject. "Congress, by using [a restrictive definition of 'individual'] intended to distinguish 'between the rights which are given to the citizens as individuals under this Act and the rights of * * * corporations which are not intended to be covered by this Act." See S. Rep. No. 1183, 93d Cong., 2d Sess. 79 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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